

BLANK ROME LLP
Ana Tagvoryan (SBN 246536)
ATagvoryan@BlankRome.com
Neeru Jindal (SBN 235082)
NJindal@BlankRome.com
Harrison Brown (SBN 291503)
HBrown@BlankRome.com
2029 Century Park East, 6th Floor
Los Angeles, California 90067
Telephone: 424.239.3400
Facsimile: 424.239.3434

Attorneys for Defendant
YTEL, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LAURA C. DE LA CABADA and
DEBRA WILLIAMS, individually and on behalf
of all others similarly situated,

Plaintiffs,

vs.

YTEL, INC., a California corporation,

Defendant.

Case No. 3:19-cv-07178-JSC

(Assigned to Magistrate Judge
Jaqueline Scott Corley)

**NOTICE OF MOTION AND MOTION
TO DISMISS PLAINTIFFS' FIRST
AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Federal Rules of Civil Procedure 12(b)(6)

[Filed concurrently with (Proposed) Order
and Proof of Service]

Date: March 5, 2020

Time: 9:00 a.m.

Courtroom: F, 15th Fl.

Complaint Filed: October 30, 2019

1 TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on March 5, 2020, at 9:00 a.m., before the Hon. Jaqueline
3 Scott Corley, located at the San Francisco Courthouse, Courtroom F—15th Floor, 450 Golden
4 Gate Avenue, San Francisco, CA 94102, Defendant Ytel, Inc. (“Ytel”) will and hereby does move
5 to dismiss the First Amended Class Action Complaint (“FAC”) of Plaintiffs Laura C. De La
6 Cabada and Debra Williams (“Plaintiffs”) pursuant to Rule 12(b)(6) of the Federal Rules of Civil
7 Procedure. The foundation of Ytel’s motion is that Plaintiffs fail to plead facts supporting their
8 conclusory claims in the FAC that Ytel is directly liable to Plaintiffs, or that Ytel is not a common
9 carrier, therefore failing to state a claim under the Telephone Consumer Protection Act (“TCPA”).

10 This motion is based upon this Notice of Motion and Motion, the attached Memorandum of
11 Points and Authorities, and the records and pleadings in this action.

12
13 DATED: January 30, 2020

BLANK ROME LLP

14
15 By: /s/ Ana Tagvoryan
16 Ana Tagvoryan
17 Neeru Jindal
18 Harrison Brown
19 Attorneys for Defendant,
20 YTEL, INC.
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

		Page
1		
2		
3	I. INTRODUCTION	1
4	II. SUMMARY OF ALLEGATIONS	2
5	A. Yakim Manasseh Jordan and Manasseh Jordan Ministries	2
6	B. Ytel.....	2
7	C. Plaintiffs’ Claims	3
8	D. The 2016 Molitor Action	4
9	III. LEGAL STANDARD.....	5
10	IV. THE FAC SHOULD BE DISMISSED.....	5
11	A. Plaintiffs Do Not Provide Clear Notice of the Conduct They Attribute to Ytel	
12	Because They Make Contradictory Allegations as to the Roles of Ytel and	
	MJM.....	5
13	B. The Facts Pled by Plaintiffs Do Not Establish that Ytel is Directly Liable.....	8
14	C. Ytel Is a Mere Common Carrier and Exempt from Liability.....	10
15	V. CONCLUSION.....	12
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES**Page(s)****Cases**

<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	5
<i>Bauman v. Saxe</i> , No. 2:14-cv-01125-RFB-PAL, 2019 WL 591439 (D. Neb. Feb. 13, 2019).....	10
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	5
<i>In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of</i> <i>1991</i> , 7 FCC Rcd. 8752 (1992).....	10, 11
<i>In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of</i> <i>1991</i> , 30 F.C.C. Rcd. 7961 (2015).....	8, 9
<i>Jackson v. Caribbean Cruise Line, Inc.</i> , 88 F. Supp. 3d 129 (E.D.N.Y. 2015)	5, 8
<i>Jeffrey Molitor, et al. v. Manasseh Jordan Ministries, Inc., et al.</i> . (Dkt #11-1.).....	4, 7, 10, 11
<i>Kauffman v. CallFire, Inc.</i> , 141 F. Supp. 3d 1044 (S.D. Cal. 2015).....	10, 12
<i>Khoja v. Orexigen Therapeutics, Inc.</i> , 899 F.3d 988 (9th Cir. 2018), <i>cert. denied sub nom. Hagan v. Khoja</i> , 139 S. Ct. 2615 (2019).....	3
<i>Klein v. Just Energy Grp., Inc.</i> , No. 14-1050, 2016 WL 3539137 (W.D. Pa. June 29, 2016)	5
<i>Kristensen v. Credit Payment Servs.</i> , 12 F. Supp. 3d 1292 (D. Nev. 2014).....	5
<i>Kwan v. Sanmedica Int’l</i> , 854 F.3d 1088 (9th Cir. 2017)	5
<i>Melito v. Am. Eagle Outfitters, Inc.</i> , No. 14-02440, 2015 WL 7736547 (S.D.N.Y. Nov. 30, 2015).....	5, 6
<i>Reese v. Marketron Broad. Sols., LLC</i> , No. 17-9772, 2018 WL 279633 (E.D. La. Jan. 3, 2018).....	6
<i>Rinky Dink, Inc. v. Elec. Merch. Sys.</i> , No. 13-1347, 2015 WL 778065 (W.D. Wash. Feb. 24, 2015).....	10, 11

1	<i>Thomas v. Taco Bell Corp.</i> ,	
2	879 F. Supp. 2d 1079 (C.D. Cal. 2012), <i>aff'd</i> , 582 F. App'x 678 (9th Cir. 2014)	6
3	<i>United States v. Ritchie</i> ,	
4	342 F.3d 903 (9th Cir. 2003)	5
5	<i>Weisbuch v. Cnty. of L.A.</i> ,	
6	119 F.3d 778 (9th Cir. 1997)	5
7	Statutes	
8	47 U.S.C. § 227	4
9	47 U.S.C. § 227(b)	5
10	47 U.S.C. § 227(b)(1)(A)(iii)	5
11	Other Authorities	
12	<i>Rules and Regulations Implementing the TCPA of 1991</i> , 68 F.R. 44144-01, 44169 at ¶	
13	138 (July 25, 2003)	11

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Laura C. De La Cabada and Debra Williams (“Plaintiffs”) bring this lawsuit against Defendant Ytel, Inc. (“Ytel”) despite knowing that the conduct at-issue in their First Amended Complaint (“FAC”) has nothing to do with Ytel, a communications service provider. Plaintiffs take issue with phone calls and text messages they allegedly received from third-party Manasseh Jordan Ministries and Yakim Manasseh Jordan (collectively, “MJM”), whom Ms. De la Cabada sued in a 2016 putative class action for TCPA violations in connection with nearly identical phone calls and text messages.¹ Ms. De la Cabada admitted in that lawsuit that *MJM was responsible* for making and initiating the calls and texts.

Despite the fact that Ms. De la Cabada alleged in the 2016 class action that MJM, alone, made or initiated calls and texts, Ms. De la Cabada and Ms. William now cannot make up their minds as to who they believe made or initiated calls or texts. Every fact recited by Plaintiffs in the instant FAC suggests that MJM made or initiated the calls or texts at issue in this case. But at the same time, Plaintiffs allege in a conclusory fashion that Ytel makes and initiates calls. Plaintiffs’ confusing and contradictory allegations leave Ytel guessing as to what role Plaintiffs allege Ytel played in the conduct at issue. Under case law interpreting the TCPA and as a matter of common sense, a phone call or text message can be made or initiated by only one party. While another party could be held liable for an illegal call or text message if certain conditions are met, it is physically impossible for two parties to make or initiate the same call or text message. Plaintiffs’ contradictory allegations thus necessitate dismissal.

To the extent Plaintiffs believe that Ytel is directly liable, Plaintiffs plead no facts in support of their contention. Plaintiffs do not allege any facts which suggest that Ytel, a provider of communication services to a wide range of businesses, actually dialed Plaintiffs or sent Plaintiffs messages about prayer. Nor do Plaintiffs plead any facts which suggest that Ytel controlled the

¹ Ultimately, De la Cabada obtained a default judgment against MJM in early 2019, but her years of litigation was a pyrrhic victory as she has been unable to collect on her judgment.

1 content of the messages about “the Lord” which Plaintiffs received.

2 The facts pled by Plaintiffs establish that Ytel is a common carrier exempt from liability.
 3 Plaintiffs have not alleged any facts that give rise to an inference that Ytel was so closely involved in
 4 placing calls or text messages that Ytel can be deemed to have made that call or text, let alone that
 5 Ytel knew that MJM was making allegedly illegal calls and texts without prior express consent. The
 6 facts alleged by Plaintiffs establish that MJM, *not Ytel*, controlled and initiated the making of the
 7 calls and sending of the texts at-issue, including deciding the who, what, where, when and how of
 8 such calls and texts. Ytel can therefore have no liability under the TCPA.

9 For these reasons, and as discussed more fully herein, Plaintiffs’ FAC should be dismissed
 10 without further leave to amend.

11 **II. SUMMARY OF ALLEGATIONS**

12 **A. Yakim Manasseh Jordan and Manasseh Jordan Ministries**

13 Yakim Manasseh Jordan is an evangelical prophet and founder of Manasseh Jordan
 14 Ministries. (FAC, ¶ 38.) MJM engages in a “pay for prayer” business model and seeks donations
 15 from his followers via text messages and prerecorded telephone calls. (*Id.*, ¶¶ 38-41.)

16 **B. Ytel**

17 Plaintiffs allege that Ytel is a “cloud-based text messaging and calling system” that provides
 18 its customers with a platform “for the creation and execution of telemarketing and text messages.”
 19 (*Id.*, ¶¶ 1, 16.) In their FAC, Plaintiffs say that Ytel offers its customers (1) a “voice broadcast
 20 feature” where a user is able to upload a recording and send it to call recipients (*id.*, ¶ 17); and (2) a
 21 “SMS broadcast” feature where a user is able to “compos[e] and send[] text messages” to a
 22 recipient’s mobile phone (*id.*, ¶¶ 20-21). Users are able to upload a list of contacts to dial. (*Id.*, ¶ 21;
 23 *see also*, Figure 2.) While Plaintiffs’ FAC continues to allege in a barebone fashion that Ytel’s
 24 system “has the capacity to produce numbers to be messaged, using a random or sequential number
 25 generator, and to dial such numbers”, these allegations are contradicted by the publicly available
 26
 27
 28

1 information contained on Ytel’s website.^{1F²} (*Id.*, ¶ 21.) In fact, Ytel provides numbers that its
 2 customers can place outbound calls from, *not to*. (See <https://www.ytel.com/products>, last visited
 3 January 30, 2020.)

4 **C. Plaintiffs’ Claims**

5 Having failed to collect on the default judgment entered in the prior lawsuit against MJM,
 6 Plaintiffs now sue Ytel claiming that it “partners” with MJM and that it “allowed” MJM to make
 7 pre-recorded calls and send text messages “without first obtaining prior express consent from
 8 consumers,” in violation of the TCPA. (FAC, ¶ 28.) Plaintiffs go on to allege that Ytel “played an
 9 integral role” in MJM’s “spamming” of consumers’ phones. (*Id.*, ¶ 36.)

10 De la Cabada claims to have received “large numbers of pre-recorded calls and text messages
 11 to her cellular phone from MJM” along with voicemails requesting the recipient dial a certain
 12 number so that a male voice can “tell you what Master Jesus has been whispering into my ear.” (*Id.*,
 13 ¶ 49.) De la Cabada does not provide the dates or times of these texts or calls to provide Ytel with
 14 adequate notice of the offending conduct or to allow Ytel to evaluate a statute of limitations defense,
 15 nor does she allege that she ever called the number left in the voicemails. However, De la Cabada
 16 does admit that she previously filed a federal lawsuit against MJM for alleged TCPA violations and
 17 obtained a default judgment against MJM on March 22, 2019. (*Id.*, ¶ 51.) Tellingly, however,
 18 Plaintiffs did not name Ytel in the MJM lawsuit.

19 Plaintiff Williams similarly alleges that on unspecified dates and times, she received
 20 “automated calls and texts from MJM... for years” that she conclusively claims were “knowingly
 21

22 ² Because Plaintiffs’ FAC includes selective screenshots from Ytel’s website, it is appropriate for
 23 Ytel to refer to, and for this Court to consider, other parts of Ytel’s website for a more robust
 24 understanding of Ytel’s business. The doctrine of incorporation by reference permits a district court
 25 to consider, as part of the complaint itself, documents whose contents are alleged in the complaint
 26 and whose authenticity no party questions. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988,
 27 1002 (9th Cir. 2018), *cert. denied sub nom. Hagan v. Khoja*, 139 S. Ct. 2615 (2019) (incorporation
 28 by reference is “a judicially-created doctrine that treats certain documents as though they are part of
 the complaint itself.”) This is to prevent “plaintiffs from selecting only portions of documents that
 support their claims, while omitting portions that weaken—or doom—their claims.” *Id.*
 Incorporation by reference is appropriate “if the plaintiff refers extensively to the document or the
 document forms the basis of the plaintiff’s claim.” *Id.*

1 supported by Ytel.” (*Id.*, ¶ 54.)

2 **D. The 2016 *Molitor* Action**

3 In February 2016, De la Cabada filed a lawsuit against Manasseh Jordan Ministries, Inc. and
 4 Yakim Manasseh Jordan in the U.S. District Court for the Northern District of Illinois, No. 1:16-cv-
 5 02106, entitled *Jeffrey Molitor, et al. v. Manasseh Jordan Ministries, Inc., et al.* (the “*Molitor*
 6 Action”). (Dkt #11-1.) In that lawsuit, De la Cabada sought “to put a stop to the incessant and
 7 abusive spam robocalling practices [Manasseh and MJM] have perpetrated for years, ad nauseum, in
 8 violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227.” (*Id.* at p. 1.) In the First
 9 Amended Complaint filed in the *Molitor* Action, De la Cabada alleged that MJM engaged in robo-
 10 calling using Mr. Jordan’s voice. (*Id.* at ¶ 3.) Specifically, De la Cabada stated that “Manasseh,
 11 through MJM, placed thousands of [] prerecorded phone calls to the cellphones of consumers who
 12 did not consent to be called and who have *never* interacted with Defendants in any way whatsoever.”
 13 (*Id.* at ¶ 31) (Emphasis in original.) De la Cabada went on to allege that “Manasseh directly
 14 participates in these calls by recording his voice and by directing MJM, over which he exercises full
 15 domination and control, to transmit these voice recordings through automated telephone calls...”
 16 (*Id.* at ¶ 32.)

17 Ultimately, after MJM failed to defend themselves, MJM’s default was entered and De la
 18 Cabada proceeded to seek a default judgment. (*Molitor* Action, Dkt# 123.) In her Motion for
 19 Default Judgment, De la Cabada admitted that:

- 20 • MJM “went to work drumming up donations through a mass robocalling campaign”;
- 21 • The recordings on the calls were “created by Defendant Manasseh, and ‘nobody else’”;
- 22 • MJM sent out calls featuring Mr. Jordan’s prerecorded voice; and
- 23 • MJM “made calls to individuals” by using an “autodialing system, including by setting it
 24 to make a certain number of calls per hour, and by using it to call multiple phone
 25 numbers at once.”

26 (*Id.* at p. 5.) On April 28, 2019, a default judgment was entered against MJM and in favor of, *inter*
 27 *alia*, De la Cabada. (*Molitor* Action, Dkt # 130.) The putative class was defined as persons who
 28 received calls or text messages “from MJM.” (FAC, ¶ 57.)

1 **III. LEGAL STANDARD**

2 To survive a motion to dismiss, a complaint must be plausible on its face; allegations that are
3 “merely consistent” with a defendant’s liability or that only suggest “the mere possibility of
4 misconduct” do not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 679 (2009). Dismissal may be
5 based on the “lack of a cognizable legal theory or the absence of sufficient facts alleged under a
6 cognizable legal theory.” *Kwan v. Sanmedica Int’l*, 854 F.3d 1088, 1093 (9th Cir. 2017) (quotation
7 marks omitted).

8 Consequently, a motion to dismiss should be granted when a plaintiff fails to proffer “enough
9 facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
10 562, 570 (2007). Further, “a plaintiff may plead [him]self out of court” if he “plead[s] facts which
11 establish that he cannot prevail on his . . . claim.” *Weisbuch v. Cnty. of L.A.*, 119 F.3d 778, 783 n.1
12 (9th Cir. 1997). Where the complaint fails to plead facts that raise a sufficiently plausible right to
13 relief, it must be dismissed. *Twombly*, 550 U.S. at 570.

14 “A court may...consider certain materials—documents attached to the complaint, documents
15 incorporated by reference in the complaint, or matters of judicial notice—without converting the
16 motion to dismiss into a motion for summary judgment.” *United States v. Ritchie*, 342 F.3d 903, 908
17 (9th Cir. 2003).

18 **IV. THE FAC SHOULD BE DISMISSED.**

19 **A. Plaintiffs Do Not Provide Clear Notice of the Conduct They Attribute to Ytel** 20 **Because They Make Contradictory Allegations as to the Roles of Ytel and MJM.**

21 Plaintiffs cite to 47 U.S.C. § 227(b) in their FAC. “The plain language of section
22 227(b)(1)(A)(iii) imposes liability upon persons that ‘make’ a telephone call or text.” *Klein v. Just*
23 *Energy Grp., Inc.*, No. 14-1050, 2016 WL 3539137, at *8 (W.D. Pa. June 29, 2016). “[M]any courts
24 that have considered this provision have held that the verb ‘make’ imposes civil liability only on the
25 party that places the call or text.” *Melito v. Am. Eagle Outfitters, Inc.*, No. 14-02440, 2015 WL
26 7736547, at *4 (S.D.N.Y. Nov. 30, 2015); *see also Jackson v. Caribbean Cruise Line, Inc.*, 88 F.
27 Supp. 3d 129, 135 (E.D.N.Y. 2015) (“By its terms, 47 U.S.C. § 227(b)(1)(A)(iii), assigns civil
28 liability only to the party who ‘makes’ a call.”); *Kristensen v. Credit Payment Servs.*, 12 F. Supp. 3d

1 1292, 1301 (D. Nev. 2014) (associating the party who “made” the call with “the party who actually
 2 sent the text message”); *Thomas v. Taco Bell Corp.*, 879 F. Supp. 2d 1079, 1084 (C.D. Cal. 2012),
 3 *aff’d*, 582 F. App’x 678 (9th Cir. 2014) (“The plain language of the TCPA assigns civil liability to
 4 the party who ‘makes’ a call” and “[d]irect liability is inapplicable here as the parties do not dispute
 5 that the actual sender of the text was . . . a separate provider of text-message based services”);
 6 *see also Reese v. Marketron Broad. Sols., LLC*, No. 17-9772, 2018 WL 279633, at *2 (E.D. La. Jan.
 7 3, 2018) (dismissing TCPA claims with prejudice where “[t]he complaint directs its allegations
 8 towards ‘defendants’ as a group without explaining any particular defendant’s involvement...
 9 Because the notice pleading requirement of the Federal Rules of Civil Procedure entitles [e]ach
 10 defendant ... to know what he or she did that is asserted to be wrongful, allegations based on a theory
 11 of collective responsibility cannot withstand a motion to dismiss.” (internal quotation omitted)).

12 Courts should be critical of a plaintiff’s attempt to assert conclusory allegations, including in
 13 the context of TCPA claims. In *Melito*, for example, the court granted a motion to dismiss because
 14 the plaintiffs “fail[ed] to allege adequately that Experian [the moving defendant] actually sent any
 15 texts.” *Id.* at *4. There, the plaintiffs alleged that Experian “caused texts to be sent on behalf of” co-
 16 defendant AEO, and that, as to each of the individual plaintiffs, both defendants were “responsible
 17 for sending” the text messages. *Id.* The plaintiffs’ class allegations also alleged, in conclusory
 18 fashion, a class comprised of all persons who received a text “sent by Experian and/or a third party
 19 acting on [its] behalf.” *Id.* The court saw through this smokescreen of bald assertions—describing
 20 the complaint as containing an “interesting mix of active and passive voice allegations,” and noting
 21 “[t]he absence of an allegation of who actually ‘made’ or physically placed the text message”—and
 22 dismissed the complaint. *Id.*

23 Plaintiffs make contradictory allegations of who made or initiated the subject calls and texts.
 24 In the original complaint, Plaintiffs alleged that Ytel was vicariously liable for the offending calls
 25 and texts messages. (Compl., ¶ 68.) Yet in the FAC, Plaintiffs dropped their vicarious liability
 26 allegations against Ytel—suggesting that Plaintiffs believe Ytel is directly liable under the TCPA.
 27 And indeed, in certain places, Plaintiffs allege that Ytel called Plaintiffs. (*See* FAC, ¶ 67 (“Ytel
 28 made pre-recorded voice calls to Plaintiffs’ and members of the Class’s cellular telephones....”); ¶

78 (“Ytel made text message calls to Plaintiffs’ and members of the Class’s cellular telephones....”).

But Plaintiffs also contend that MJM made or initiated calls and text messages:

- [D]espite being subject to an FCC citation and no fewer than sixteen separate lawsuits since 2013, MJM continues to regularly bombard consumers with spam texts and calls.” (FAC, ¶ 5 (underline added));
- “Manasseh uses the same money-for-miracles storytelling techniques in his prerecorded calls and messaging campaigns. For example, he has told millions of call recipients, in his own prerecorded voice, ‘the Lord spoke to me personally about you. I must speak to you. I’m going to pass the phone to my blessed assistant and he’s [going to] give you my blessed number so that you can call me back so that you can hear this blessed word.’” (FAC, ¶ 38 (underline added));
- “MJM told call recipients that ‘GOD is Exposing those that are for you and against you, ALL for YOUR GOOD Listen Click Prophetmanasseh4u.com.’” (FAC, ¶ 39 (underline added));
- “For several years, Plaintiff De la Cabada has received large numbers of pre-recorded calls and text messages to her cellular phone from MJM.” (FAC, ¶ 49 (underline added));
- “In an effort to evade these harassing calls from MJM, De la Cabada blocked some of MJM’s phone numbers. But, MJM circumvented Plaintiff De la Cabada’s efforts and continued to call and text her from different phone numbers, including numbers with falsely localized area codes.” (FAC, ¶ 50 (underline added));
- Though Ms. De la Cabada obtained a default judgment against MJM (FAC, ¶ 51) “[t]his measure did not deter MJM in the slightest, as they continued to relentlessly call and text De la Cabada well after she filed her claim.” (FAC, ¶ 52 (underline added));
- “Williams received an automated text messages from MJM as recently as this past year, and an automated, pre-recorded call from MJM as recently as July 2019.” (FAC, ¶ 54 (underline added));
- “MJM collaborated with Defendant Ytel to develop, maintain, and execute its calling campaign.” (*Id.*, ¶ 68 (underline added); *see also* ¶ 79 (same quote).)

And yet in other places, Plaintiffs contend that Ytel and MJM made calls together:

- “Between 2015 and 2017 alone, Ytel and MJM placed over 160 million illegal robocalls to consumers around the country.” (FAC, ¶ 5);

- 1 • “MJM, along with Ytel, continues to make harassing pre-recorded calls and sends text
2 messages to consumers without first obtaining their prior express consent.” (FAC, ¶
3 48);
- 4 • “Ytel, together with MJM, placed pre-recorded voice calls to Plaintiffs’ and the Class
5 members’ cellular telephones without their prior express consent.” (FAC, ¶ 65);
- 6 • “Ytel, together with MJM, sent unwanted and unsolicited text messages to Plaintiffs’
7 and the Class members’ cellular telephone without their prior express consent.”
8 (FAC, ¶ 74);

9 Only one person can actually make or initiate a call or text message. Yet with these
10 contradictory allegations, Ytel is left to guess as to who Plaintiffs contend actually made the subject
11 calls and text messages—MJM or Ytel—and what role the other party played. Ytel should not be
12 put to the further burden of this litigation, and the massive expense it will entail, when Plaintiffs are
13 unable to plead the specific existence and role of the entity that made or initiated the allegedly
14 offending calls and texts. *See Jackson*, 88 F. Supp. 3d at 135 (granting motion to dismiss because
15 “the Court finds that the [p]laintiff has not plausibly alleged that [the defendant], as opposed to [the
16 third-party marketer], ‘made’ the relevant text message.”).

16 **B. The Facts Pled by Plaintiffs Do Not Establish that Ytel is Directly Liable.**

17 If it is in fact Plaintiffs’ belief that Ytel made or initiated the subject calls and text messages,
18 the facts which Plaintiffs advance do not support their belief. In fact, the facts show the opposite:
19 that MJM made or initiated the calls and texts.

20 As Plaintiffs acknowledge in Paragraphs 67 and 78 of the FAC, in considering who is the
21 makers or initiator of a call, the FCC considers “1) who took the steps necessary to physically place
22 the call; and 2) whether another person or entity was so involved in placing the call as to be deemed
23 to have initiated it, considering the goals and purposes of the TCPA.” *In the Matter of Rules &*
24 *Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 7980 ¶ 30
25 (2015) (“2015 FCC Declaratory Ruling”).

26 The 2015 FCC Declaratory Ruling is instructive. There, the FCC compared three petitions
27 and ruled that two entities were maker/initiators and one was not. To begin, the FCC determined
28 that YouMail does not make or initiate a call when one of the app users avails himself/herself of an

1 optional service to send an automatic text in response to a voicemail. *Id.* at 7981, ¶ 31. The FCC
 2 reasoned that “YouMail is a reactive and tailored service; in response to a call made to the app user,
 3 YouMail simply sends a text message to that caller, and only to that caller. YouMail exercises no
 4 discernible involvement in deciding whether, when, or to whom an auto-reply is sent, or what such
 5 an auto reply says, nor does it perform related functions, such as pre-setting options in the app, that
 6 physically cause auto-replies to be sent.” *Id.* at 7981, ¶ 32. The FCC also ruled that TextMe, whose
 7 app allows users to send invitational text messages to contacts in their phone’s address book, is not a
 8 maker/initiator because users must go through a multi-step process which includes tapping a button
 9 that reads “invite your friends”, choosing whether to invite all friends or only certain contacts, and
 10 sending the text by selecting another message. *Id.* at 7983-84, ¶ 36. The FCC reasoned that “the app
 11 user’s actions and choices effectively program the cloud-based dialer to such an extent that he or she
 12 is so involved in the making of the call as to be deemed the initiator of the call,” and not TextMe. In
 13 contrast to YouMail and TextMe, however, the FCC ruled that Glide is a maker/initiator. “Glide
 14 automatically sent invitational texts of its own choosing to every contact in the app user’s contact list
 15 with little or no obvious control by the user.” *Id.* at 7983, ¶ 35. “In this scenario, the app user plays
 16 no discernible role in deciding whether to send the invitational text messages, to whom to send them,
 17 or what to say in them.” *Id.*

18 The facts alleged by Plaintiffs establish that Ytel is more like YouMail and TextMe than
 19 Glide. Plaintiffs do not allege any facts which suggest that Ytel is the entity which actually placed
 20 the calls and sent the text messages to Plaintiffs. For example, the fact that Plaintiffs found online
 21 job postings for an account manager whose job it was to “[o]verse assigned customer accounts and
 22 support customers in their business needs as related to Ytel’s software products” or a product
 23 manager whose job it was to “[h]elp[] companies successfully build SMS and voice capabilities into
 24 their application” does not mean that Ytel actually took steps to dial Plaintiffs. (FAC, ¶ 27 at
 25 Figures 4 & 5.) Nor do Plaintiffs allege any facts which suggest that Ytel has any control over, or is
 26 even tangentially involved with, the design and the creation of the content of the text messages and
 27 prerecorded calls. Nor can they. It is absurd to suggest that Ytel, a “cloud-based text messaging and
 28 calling system” (FAC, ¶ 1), would at all benefit by drafting messages for the purpose of informing

1 Plaintiffs “what Master Jesus has been whispering into [MJM’s] ear” (FAC, ¶ 49).

2 Plaintiffs’ allegations are clear that MJM initiated the text messages and calls. MJM decided
3 whether, when, and to whom to send the text messages and calls. Tellingly, in the *Molitor* Action,
4 Ms. De la Cabada alleged “[t]he recordings on these calls were created by Defendant Manasseh, and
5 ‘nobody else.’” (*Molitor* Action, Dkt. # 123 at p. 5.) Plaintiffs’ failure to explain how or why Ytel,
6 and not MJM, is suddenly the one sending text messages encouraging Plaintiffs to call MJM to
7 discuss “the Lord” is fatal to their FAC.

8 Plaintiffs’ conclusory allegations make it clear that Plaintiffs have not made any plausible
9 allegation of a prohibited action by Ytel. Plaintiffs’ FAC is devoid of any allegations regarding
10 Ytel’s “involvement” in the alleged wrongful conduct. *Cf. Bauman v. Saxe*, No. 2:14-cv-01125-
11 RFB-PAL, 2019 WL 591439, at *3 (D. Neb. Feb. 13, 2019) (denying motion to dismiss where
12 plaintiff’s complaint against a communication service platform included allegations that “Twilio’s
13 alleged involvement was to an extent that Twilio could be considered to have initiated the contact,
14 ... [and] that Twilio not only knowingly allowed [its client] to use their platform for automated text
15 messages but actively helped [its client] bypass spam filters.”) Accordingly, to the extent Plaintiffs’
16 claims are premised on direct liability against Ytel, they should be dismissed.

17 **C. Ytel Is a Mere Common Carrier and Exempt from Liability.**

18 The FAC establishes that Ytel is a common carrier exempt from TCPA liability. Generally,
19 “users of [telecommunications] services, not the carriers providing the services, [are] held liable”
20 under the TCPA. *Kauffman v. CallFire, Inc.*, 141 F. Supp. 3d 1044, 1047 (S.D. Cal. 2015) (*quoting*
21 *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC
22 Rcd. 8752, 8776 n.83 (1992)). Whether or not a party is a common carrier “is a relatively simple,
23 two-part inquiry: (1) Does the entity hold itself out indifferently to all potential users or, if serving a
24 legally-defined class, hold itself out indiscriminately to serve all within that class; and (2) Does the
25 entity allow customers to transmit messages of their own design and choosing?” *Rinky Dink*, 2015
26 WL 778065, at *5.

27 Ytel is a common carrier. The FAC contains screenshots from Ytel’s website describing the
28 services provided by Ytel to its customers, indiscriminately. Specifically, Plaintiffs allege: Ytel is a

1 “cloud-based text messaging and calling system” that provides its customers with a platform “for the
 2 creation and execution of telemarketing and text messages” (FAC, ¶¶ 1, 16); Ytel offers its
 3 customers a “voice broadcast feature” where a user is able to upload a recording and send it to call
 4 recipients (*id.*, ¶ 17) and an “SMS broadcast” feature where a user is able to “compos[e] and send[]
 5 text messages” to a recipient’s mobile phone (*id.*, ¶¶ 20-21); and that users are able to upload a list of
 6 contacts to dial (*id.*, ¶ 21; *see also*, Figure 2). Plaintiffs do not allege that Ytel’s services are distinct
 7 amongst its customer base or that Ytel does not allow customers to transmit messages of their own
 8 design and choosing.

9 As a common carrier, Ytel is “not liable under the TCPA absent a ‘high degree of
 10 involvement or actual notice of an illegal use and failure to take steps to prevent such
 11 transmissions.’” *Rinky Dink, Inc. v. Elec. Merch. Sys.*, No. 13-1347, 2015 WL 778065, at *4 (W.D.
 12 Wash. Feb. 24, 2015) (quoting *In the Matter of Rules & Regulations Implementing the Tel.*
 13 *Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, 8779-80, ¶ 54 (1992)). “A ‘high degree of
 14 involvement’ exists where the broadcaster (1) controls the recipient lists; and/or (2) controls the
 15 content of the transmissions.” *Rinky Dink*, 2015 WL 778065, at *7 (citing *Rules and Regulations*
 16 *Implementing the TCPA of 1991*, 68 F.R. 44144-01, 44169 at ¶ 138 (July 25, 2003)).

17 The FAC is devoid of any facts suggesting a “high degree of involvement” in the making and
 18 initiating of calls and messages by MJM. Plaintiffs do not allege, and it is not plausible, that Ytel
 19 decided who to dial or that Ytel drafted MJM’s messages.

20 Nor do Plaintiffs allege facts to support their allegation that Ytel “knowingly allowed” MJM
 21 to use its platform for an unlawful purpose. The fact that De La Cabada sued MJM in the *Molitor*
 22 Action and supposedly told Ytel of the lawsuit in 2017 is a red herring. For a carrier to have “actual
 23 notice of an illegal” use, there needs to be a final factual finding that the customer in question is
 24 using the communication service unlawfully. Only after the carrier is notified of the final ruling can
 25 it possibly be liable, and only if the carrier refuses to prevent the subsequent transmission of
 26 messages adjudicated unlawful. *See Common Carrier Immunity Order*, 2 FCC Rcd 2819, ¶¶ 5, 9 (a
 27 common carrier can be potentially liable under this standard only if it had “actual notice” that the
 28 activity at-issue “has been adjudicated” to be unlawful, and the carrier fails to act.) Notice of

1 allegations in a lawsuit *which we never adjudicated finally on the merits* is insufficient. *See*
 2 *Kauffman v. CallFire, Inc.*, 141 F. Supp. 3d 1044, 1050 (2015) (Rejecting notion that the defendant
 3 had notice of an “illegal activity” that would exempt it from being a common carrier because “a
 4 complaint is an *allegation* of an illegal act, not *notice* of an illegal act.”) (Emphasis supplied).

5 Despite having amended their pleading in the face of Ytel’s motion to dismiss the original
 6 Complaint, Plaintiffs have *still* not alleged facts demonstrating that Ytel is anything more than a
 7 common carrier under the TCPA. Plaintiffs thus tacitly concede their inability to do so.
 8 Accordingly, Plaintiffs’ FAC should be dismissed as a matter of law.

9 **V. CONCLUSION**

10 For the reasons stated herein, Ytel requests that Plaintiffs’ FAC be dismissed with prejudice,
 11 and judgment entered in Ytel’s favor.

12
 13
 14 DATED: January 30, 2020

BLANK ROME LLP

15 By: /s/ Ana Tagvoryan
 16 Ana Tagvoryan
 17 Neeru Jindal
 18 Harrison Brown
 19 Attorneys for Defendant,
 20 YTEL, INC.
 21
 22
 23
 24
 25
 26
 27
 28